

No. 87-1166

Supreme Court, U.S.

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In The  
Supreme Court of the United States

October Term, 1987

RITA L. MENDEZ,

*Petitioner,*

vs.

IGNACIO MENDEZ,

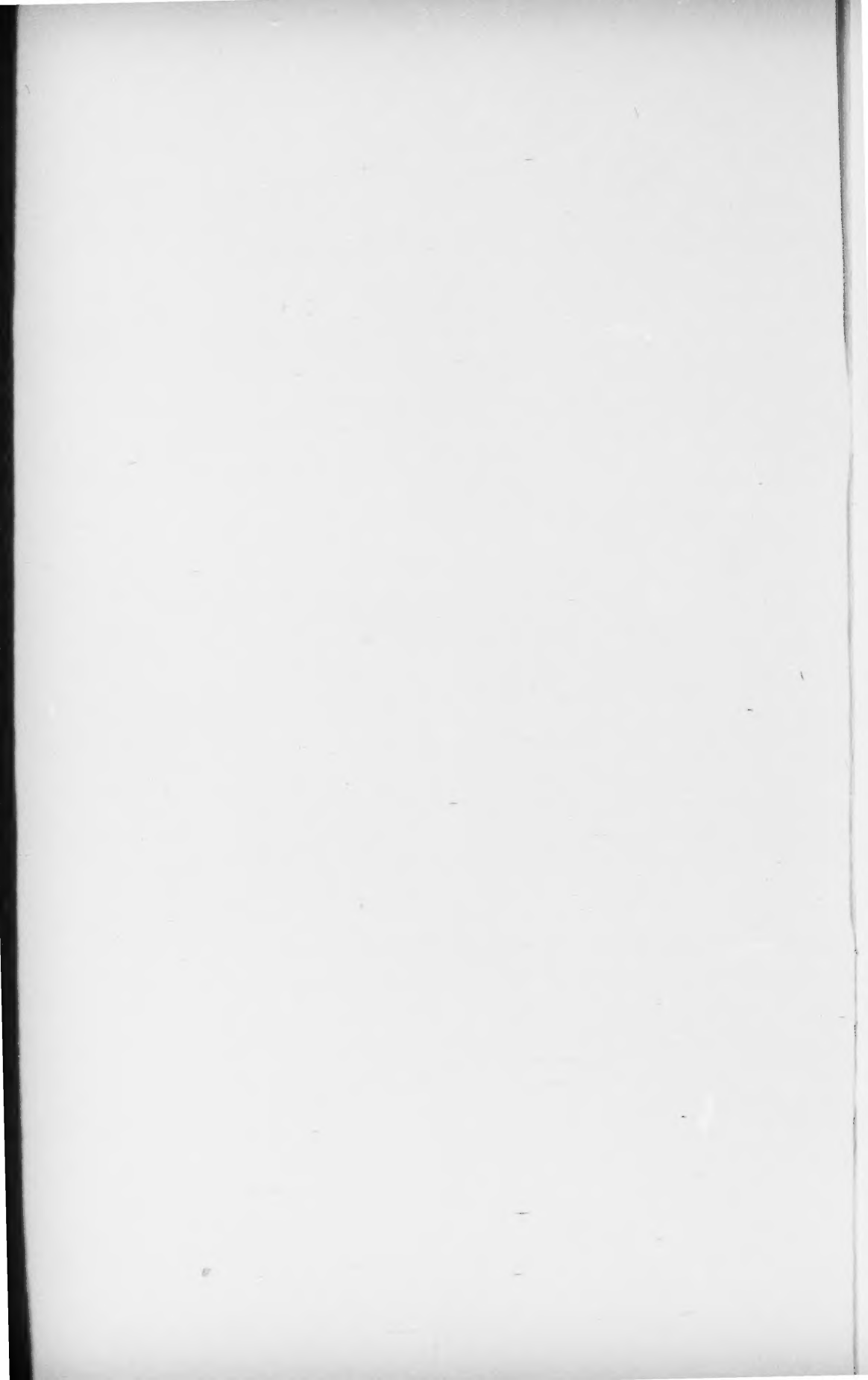
*Respondent.*

On Writ of Certiorari to the  
Florida District Court of Appeal, Third District

PETITIONER'S REPLY TO  
BRIEF IN OPPOSITION

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**PETITIONER'S REPLY TO  
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**JURISDICTION: THE FEDERAL QUESTION  
WAS RAISED.**

The record in this case belies the Respondent's assertion that the Petitioner "never presented" the constitutional issues raised herein to "a Florida court". Indeed, the Respondent's "Brief in Opposition", by quoting the concurring opinion of Judge Daniel Pearson of the Florida District Court of Appeal, establishes on its face that the issue was raised. If, as the Respondent claims, the Petitioner "never" raised a constitutional issue, how was the author of that concurring opinion able to conclude that "the trial court's decision was not based upon constitutionally impermissible grounds"?

Quite to the contrary of the Respondent's contentions, the Petitioner's argument in the District Court of Appeal was premised upon the lower court's abuse of discretion in basing its custody determination upon a constitutionally impermissible ground—her religion. The Petitioner opened the argument portion of her "Initial Brief" to the District Court of Appeal by citing the Missouri case of *Waites v. Waites*, 567 S.W.2d 326 (Mo. 1978) and, quoting that decision, asked:

[W]hat role, if any, can the factor of religion play in the judicial resolution of a child custody dispute consistent with the framework of our federal and state constitutions?

Thereafter, the Petitioner discussed, in detail, a series of state court decisions all of which cases, and the discussion thereof, dealt with the question of the "constitutionality" of a trial court's reliance upon the religion of one of the parents as a factor in a child custody dispute.

Simultaneously with the filing of the Petitioner's "Initial Brief" in the District Court of Appeal, the American Civil Liberties Union Foundation of Florida, Inc. (ACLU) filed a "Motion for Leave to File Brief as Amicus Curiae" in support of the position of the Petitioner. The ACLU requested permission to appear as amicus for the express purpose of:

[H]ighlight[ing] the constitutional issues raised by the trial court's order which implicate fundamental rights safeguarded by the First and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 3 and 9 of the Florida Constitution.

The District Court of Appeal, "upon consideration" of the motion, granted permission to the ACLU to file a brief as amicus curiae and, later, to participate in oral argument. The brief submitted to the District Court by the amicus contained the following argument:

IN A CHILD CUSTODY PROCEEDING DEVOID OF EVIDENCE THAT THE RELIGION OF THE WIFE WAS INIMICAL TO THE WELFARE OF THE PARTIES' MINOR CHILD, THE TRIAL COURT ERRED BY DENYING CUSTODY TO THE WIFE SOLELY BECAUSE SHE IS A JEHOVAH'S WITNESS, IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Respondent, who now asserts that no "references" to any constitutional issues were made below, responded to the Petitioner's arguments on appeal by stating the following:

[The Petitioner's] argument, when reduced to its essentials is: the Court below erred because it based its decision on a choice of religion as opposed to what is in the best interest of the child.

\* \* \*

Significantly, the religious needs of a child can be considered and a statute which so provides is not unconstitutional on its face.

\* \* \*

When [the Petitioner's] argument is carried to its logical extension, it could be said that a decision awarding custody of the child to the Wife would violate the Father's rights and unconstitutionally deny his right to freedom of religion.

\* \* \*

It is important that it be demonstrated to the Court that the religious rights of the Mother are in no way infringed upon by the ruling of the Court.

If, as the Respondent claims, "no constitutional question was presented below" and the issue is "now presented for the first time", why did the Respondent find it necessary to discuss below the "constitutionality" of the trial court's consideration of religion in this case?

The opinion of the District Court of Appeal<sup>1</sup> directly addressed the constitutional issues raised by the Petitioner by holding:

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<sup>1</sup>Contrary to the Respondent's claim that Petitioner was able to seek review in the Florida Supreme Court, the opinion of the District Court of Appeal, although clearly addressing the constitutional issues raised by the Petitioner, did not afford the opportunity to seek discretionary review in the Florida Supreme Court. The jurisdiction of the Florida Supreme Court is restricted to decisions which "expressly construe a provision of the state or federal constitution." Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure. "Expressly," in this context, means "within the written district court opinion". *School Board of Pinellas County v. District Court of Appeal*, 467 So.2d 985 (Fla. 1985). An opinion does not "construe" a provision of the constitution unless it "undertakes to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision". *Ogle v. Pepin*, 273 So.2d 391 (Fla. 1973). The Petitioner attempted to seek review in the Florida Supreme Court by the only method available to her: she filed a "Suggestion for Certification" asking that the District Court "certify" the case to the Florida Supreme Court as one of great public importance. The Petitioner's basis for seeking certification was that "the importance of this case lies in the need to resolve a question of *constitutional proportions*, specifically, whether and under what circumstances may the religious beliefs and values of parents in a child custody case be considered as a 'factor' aiding the court in its child custody determination?" The Petitioner's request for certification was denied by the District Court of Appeal. (Emphasis supplied)

The record in this case does not support the [Petitioner's] contention that the trial court made the [Respondent] the primary residential parent of the parties' minor child solely because the [Petitioner] is a practicing Jehovah's Witness. Instead, the record reflects that the trial court, after considering the testimony of numerous experts, the parties and their relatives and friends, and a guardian ad litem appointed to represent the minor, considered, as it had a right to do, *Rogers v. Rogers*, 490 So.2d 1017 (Fla. 1st DCA 1986), the effect on the child caused by the conflicting religious beliefs of the parents and, in ruling, conscientiously avoided any interference with the right of the non-custodial parent to practice her religion and avoided the imposition on her of an obligation to enforce the religious beliefs of the [Respondent].

The Petitioner sought rehearing and rehearing en banc on four grounds, two of which were the following:

The trial court did not "conscientiously avoid" any interference with the right of the non-custodial parent (the Mother) to practice her religion but, rather, the trial court expressly and specifically prohibited the Mother from "expos[ing] the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the religious teachings and practices of the Catholic religion". This restriction upon the Mother places her in the anomalous position of having a *constitutional right* to express her religious views to complete strangers, but not to her own child. (Emphasis supplied)

\* \* \*

The panel opinion relies upon the decision of *Rogers v. Rogers*, 490 So.2d 1017 (Fla. 1st DCA 1986) which, by holding that a trial court may consider "religious beliefs and values" in a child custody case with no

further limitation upon the circumstances under which such consideration may take place, is *unconstitutional*. (Emphasis supplied)

The Petitioner's request for rehearing and rehearing en banc was denied in divided opinions, the contents of which raise yet another question: If, as the Respondent claims, the Petitioner "did not mention or present [a] constitutional question", why did seven of the nine judges comprising the Florida District Court of Appeal find themselves compelled to discuss the constitutional issue in the several concurring and dissenting opinions on rehearing en banc?<sup>2</sup> Clearly, the constitutional issues presented by this case were raised below and the Respondent's contentions to the contrary are disingenuous at best.

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<sup>2</sup>Judges Pearson, Hubbart, Nesbitt and Jorgenson concurred in the denial of rehearing en banc upon the express basis that "the trial court's decision was not based upon *constitutionally impermissible grounds*". Judges Baskin and Ferguson dissented from the denial of rehearing en banc because "the trial court's *curtailment of first amendment rights* should compel the court to recognize the presence of issues of great public importance and grant en banc relief or, at a minimum, certify the following question as one of great public importance: whether, and to what extent, may a trial court base its decision to award child custody on the religious beliefs and practices of one of the parents?" Chief Judge Alan R. Schwartz dissented from the denial of rehearing en banc upon the basis that, "the record in this case presents a substantial question concerning the interplay between the best interests of the child in a custody case and a parent's religious practices of which the judge may personally disapprove or find distasteful. The importance, indeed the *constitutional necessity*, of drawing an impenetrable line between the two factors in every case in which there is no demonstrable harm to the child . . . and the real possibility . . . that the line was improperly crossed below, render it clearly appropriate that this case be determined en banc as one of great public importance". (All emphasis supplied)

### **THE RESPONDENT'S ARGUMENT: ECHOES OF PALMORE V. SIDOTI.**

The Respondent's argument that the custody of the child in this case was decided on an "adequate state ground" and upon factors other than the religion of the child's mother echoes the argument of the respondent in *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984)—an argument unanimously rejected by this Court.

Like the respondent in *Palmore*, the Respondent here attempts to portray the Florida court's decision as being based on factors other than those which are constitutionally impermissible. The Respondent claims that "there was substantial, voluminous and impressive testimony presented to the trial court with respect to the parenting abilities of the Father". In fact, there was no such testimony, and the Respondent's complete failure to set forth even one example of the so-called "substantial, voluminous and impressive" testimony speaks for itself.<sup>3</sup>

Contrary to the Respondent's position, this case was not decided in the "best interest" of the child. If it had been, the child would now be with her mother, the Petitioner, the child's "nurturing mother", "prime parent figure" and "psychological parent". There can be no greater proof of the true basis of the custody decision here than the fact that, in one breath, the trial judge

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<sup>3</sup>Also akin to *Palmore*, the Respondent here restates the questions presented to this Court in an obvious attempt to "deemphasize the significance of the [constitutional issue] by suggesting it was only one of several factors involved in the Florida court's decision". See Silverberg and Jonas, *Palmore v. Sidoti: Equal Protection and Child Custody Determinations*, 18 Family Law Quarterly 335, 335 (Fall 1984).

termed both the Petitioner and the Respondent "fit and proper" parents and, in the next, awarded custody of the child to the Respondent and forbade the Petitioner from "exposing" the child to her religious beliefs. To deprive a mother of her child because she worships a God named Jehovah is repugnant to the Constitution. Only this Court can remedy this injustice.

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### CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Florida District Court of Appeal, Third District.

Respectfully submitted,

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